



MIAMI BEACH

OFFICE OF THE CITY MANAGER

NO. LTC #
037-2006

LETTER TO COMMISSION

TO: Mayor David Dermer and Members of the City Commission

FROM: Jorge M. Gonzalez, City Manager

DATE: February 6, 2006

SUBJECT: Carrfour Supportive Housing, Inc. Sunsouth Project

At the Finance and Citywide Committee meeting of January 19, 2005, it was requested that additional information be provided on the status of the Carrfour Supportive Housing, Inc. project known as Sunsouth, located at 530 Meridian Avenue.

Committee members were specifically interested in the likelihood that this project would be completed in a timely manner and in accordance with the terms of the City of Miami Beach HOME Program Agreement.

As instructed by Committee members, City staff contacted Carrfour Supportive Housing directly for an updated project budget. On January 31, 2006, Ms. Maria Pellerin Barcus, President/CEO, Carrfour Supportive Housing, replied indicating that she could not provide an updated project budget at this time due to a pending Planning Board application. As you are aware, the Planning Board denied the conditional use for the project at their December meeting, but voted at its January 2006 meeting to reconsider that decision. The Planning Board is scheduled to again review the application and modifications proposed by Carrfour in March 2006. Ms. Pellerin-Barcus' email states that the general contractor may have to re-bid the subcontracts at such time as the zoning issue is resolved. Therefore, no updated budget is available at this time.

We have recently been advised that the Homeless Trust, at its January 20, 2006 Executive Committee meeting, authorized staff to issue a notice of default under the Homeless Housing Assistance Grant (HHAG) Sub-Agreement they administer. The notice will require a repayment of the grant. They expect to issue the notice today or tomorrow; Carrfour will have ten (10) days to respond. The amount of the HHAG grant is \$365,000.00.

Should you have any additional questions or concerns, please do not hesitate to contact my office.

JMG/HMF/VPG

CITY CLERK'S OFFICE

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City of Miami Beach, 1700 Convention Center Drive, Miami Beach, Florida 33139, www.miamibeachfl.gov

COMMISSION MEMORANDUM

TO: Mayor David Dermer and Members of the City Commission

FROM: Murray H. Dubbin, City Attorney 
Gary M. Held, First Asst. City Attorney 

CC: Jorge M. Gonzalez, City Manager

DATE: February 6, 2006

SUBJECT: **HOME Program Agreement for 530 Meridian Avenue with Carrfour Supportive Housing/SunSouth, Inc.**

Commissioner Garcia has requested that this Office provide a summary of the termination provisions of the subject Agreement. This memorandum responds to that request. This memorandum contains a recital of the applicable contract provisions and regulations and is not to be construed as an opinion or recommendation for addressing the relationship between the City and Carrfour. The provisions of the Agreement providing for termination in Articles IX, XXV and XXVI of the Agreement, and Article XXVII – Additional Remedies are set forth below, as well as the CFR (Code of Federal Regulations) sections referred to in the termination articles of the Agreement.

ARTICLE IX – TERMINATION

The City and Owner agree that this Agreement may be terminated by the City, in whole or in part, for cause (as defined in Article XXVI [sic] herein and in accordance with the provisions of 24 CFR Part 85.43) or for convenience (as defined in Article XXVII [sic] and in accordance with the provisions of 24 CFR, Part 85.44 [the CFR provisions are explained below]). A written notification shall be required at least thirty (30) days prior to the effective date of such termination, and shall include the reason for the termination (if for cause), the effective date, and in the case of a partial termination, the actual portion(s) to be terminated.

ARTICLE XXV – TERMINATION FOR CAUSE

The City may place Owner in default of this Agreement and may suspend or terminate this Agreement, in whole or in part, for cause, as prescribed in Article X herein. "Cause" shall include, but not be limited to, the following:

- (a) Owner's failure to (i) diligently pursue additional Project financing and to close on the acquisition of the Project within 60 days from the date of execution of this Agreement; or (ii)

commence work within thirty (30) days from the date of issuance of the Notice to Proceed; or (iii) diligently pursue construction and timely complete the project by securing a Final Certificate of Completion within twelve (12) months from the date of execution of this Agreement.

Work shall be considered to have commenced and be in active progress when, in the sole opinion of the City, a full complement of workers and equipment is present at the site to diligently incorporate materials and equipment into the structure throughout the day on each full working day, weather permitting.

(b) Owner's failure to comply with applicable building, fire, life safety, housing and zoning laws, rules, regulations and codes.

(c) Owner's default on any of the terms and conditions of the note, mortgage, or other loan document executed by Owner in favor of a Lender. The affordability requirements apply without regard to the term of any loan or mortgage or the transfer of ownership. They must be imposed by deed restrictions, covenants running with the land, or other mechanisms approved by HUD, except that the affordability restrictions may terminate upon foreclosure or transfer in lieu of foreclosure.

(d) Owner's failure to maintain the insurance required by the City and/or Lender.

(e) Failure to comply and/or perform in accordance with any of the terms and conditions of this Agreement, or any Federal, State or local regulation.

(f) Submitting any required report to the City which is late, incorrect, or incomplete in any material respect after notice and reasonable opportunity to cure, as set forth in subparagraph (h) hereof, has been given by the City to Owner.

(g) Implementation of this Agreement, for any reason is rendered impossible or infeasible.

(h) Failure to respond in writing, within thirty (30) days of notice of same from City to any concerns raised by the City, including providing substantiating documentation when requested by the City.

(i) Any evidence of fraud, waste or mismanagement as determined by the City's monitoring of project(s) under this Agreement, or any violation of applicable HUD rules and regulations.

- (j) Owner's insolvency or bankruptcy.
- (k) An assignment or transfer of this Agreement or any interest therein which does not comply with the procedures set forth in Article XXV herein.
- (l) Claims of lien not satisfied or bonded-off, in accordance with Florida Statutes, within 60 days from the date of filing of any such lien.
- (m) Failure to comply and/or perform in accordance with the affordability requirements, and/or an unauthorized transfer of title of its HOME projects.

If the default complained of is not fully and satisfactorily cured within thirty (30) days of receipt of such notice of default to Owner, at the expiration of said thirty (30) day period (or such additional period of time, as permitted by the City, in its sole discretion, as required to cure such default, in the event Owner is diligently pursuing curative efforts) this Agreement may, at the City's sole option and discretion, be deemed automatically canceled and terminated, and the City fully discharged from any and all liabilities, duties and terms arising out of, or accruing by virtue of this Agreement. In the event of a default for cause, the City may, at its option, avail itself of any and all remedies pursuant to 24 CFR Part 85.43, as amended from time to time, including suspension, in whole or in part, of Owner's grant award(s); recapture of the Funds, as set forth herein; and any other remedies that may be legally available.

ARTICLE XXVI – TERMINATION FOR CONVENIENCE

Notwithstanding Article XXVI above, Owner herein consents that the City may terminate this Agreement, in whole or in part, for convenience, as set forth in 24 CFR Part 85.44.

ARTICLE XXVII – ADDITIONAL REMEDIES

In the event of a default and termination for cause, the City shall be entitled to bring any and all legal and/or equitable actions which it deems to be in its best interest, in Miami-Dade County, Florida, in order to enforce the City's rights and remedies against the defaulting party. The City shall be entitled to recover all costs of such actions, including reasonable attorney's fees. To the extent allowed by law, the defaulting party waives its right to jury trial and its right to bring permissive counterclaims against the City in any such action.

The CFR provisions referenced above establish certain procedures

adopted by US HUD applicable to the City's issuance of grants to Sunsouth, as set forth below. They fall under CFR Chapter 85, entitled "Administration Requirements for Grants and Cooperative Agreements." The Agreement with Sunsouth incorporated these provisions and made them applicable to terminations, in Article IX.

CFR Sec. 85.43 Enforcement.

- (a) Remedies for noncompliance. If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a state plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate to the circumstances:
 - (1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,
 - (2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,
 - (3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,
 - (4) Withhold further awards for the program, or
 - (5) Take other remedies that may be legally available.
- (b) Hearings, appeals. In taking an enforcement action, the awarding agency will provide grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.
- (c) Effects of suspension and termination. Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:
 - (1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,
 - (2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.
- (d) Relationship to debarment and suspension. The enforcement

remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to 'Debarment and Suspension' under E.O. 12549.

CFR Sec. 85.44 Termination for convenience.

Except as provided in Sec. 85.43 awards may be terminated in whole or in part only as follows:

- (a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or
- (b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either Sec. 85.43 or paragraph (a) of this section.

The following are some (not exhaustive) comments of this office identifying issues pertinent to the question of compliance or termination, namely:

1. Agreement Article III, section (m) requires "Owner agrees to advise the City in writing within thirty (30) days of any organizational, operational or legal status changes made by Owner that affect documents that were submitted by Owner." Owner did not advise City as grantor that the project's operational plans had changed from transitional to permanent housing.
2. Agreement Article XXV, section (a)(iii) provides that the Owner's failure to "diligently pursue construction and timely complete the project by securing a Final Certificate of Completion within twelve (12) months from the date of execution of this Agreement" may be a basis for termination. Execution of the Agreement was December 10, 2003. In "Scope of Services", item 11, "Project Development Schedule," the date for "Complete Construction" was September 2004.